

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE  
CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 07/21/2011  
RUTH A. WILLINGHAM,  
CLERK  
BY: DLL

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

JUAN C. DAVILA-LAZARO,	)	No. 1 CA-IC 10-0039
	)	
Petitioner,	)	DEPARTMENT E
	)	
v.	)	MEMORANDUM DECISION
	)	
THE INDUSTRIAL COMMISSION OF ARIZONA,	)	(Not for Publication -
	)	Rule 28, Arizona Rules
Respondent,	)	of Civil Appellate
	)	Procedure)
CHARLES & JOYCE TATHAM,	)	
	)	
Respondent Employer,	)	
	)	
SPECIAL FUND DIVISION/NO INSURANCE	)	
SECTION,	)	
	)	
Respondent Party in Interest,	)	
	)	

Special Action - Industrial Commission

ICA Claim No. 20092-460191

Carrier Claim No. 20092-460191

Administrative Law Judge Stephen W. Pogson

**AWARD AFFIRMED**

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**P O R T L E Y**, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review for a noncompensable claim. The petitioner employee ("claimant") presents three issues on appeal:

- (1) whether the administrative law judge's ("ALJ") award contains legally sufficient findings for this court's review;
- (2) whether the ALJ erred as a matter of law by concluding that claimant was an independent contractor; and
- (3) whether the ALJ erred as a matter of law by concluding that the respondent employer ("Tatham") was not an employer subject to the Arizona Workers' Compensation Act.

Because we find the award legally sufficient and that the accepted evidence of record supports the ALJ's finding that claimant was an independent contractor as to Tatham on the date of injury, we affirm the award.

## **JURISDICTION AND STANDARD OF REVIEW**

¶2 This court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) (2003), 23-951(A) (1995), and Arizona Rule of Procedure for Special Actions 10. We consider the evidence in the light most favorable to upholding the award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002). In reviewing findings and awards of the ICA, we defer to the ALJ's factual findings, *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003), but review the ALJ's ruling concerning claimant's employment status de novo as an issue of law. *Vance Int'l v. Indus. Comm'n*, 191 Ariz. 98, 100, ¶ 6, 952 P.2d 336, 338 (App. 1998).

## **PROCEDURAL AND FACTUAL HISTORY**

¶3 On August 22, 2009, claimant was working on a house located at 30th Street and Monte Vista ("30th Street house") owned by Tatham. While cutting plywood with an electric-powered saw, he sustained a severe left hand injury which included traumatic amputations of his index finger and thumb, as well as wounds to the remaining digits. Claimant filed a workers' compensation claim, which was denied for benefits, and he timely requested a hearing. The parties filed various records regarding claimant's injuries and his employment with Tatham.

See Arizona Administrative Code ("A.A.C.") R20-5-155. The ALJ then held an ICA hearing for testimony from claimant and Tatham.<sup>1</sup> Following the hearing, the ALJ entered an award for a noncompensable claim, and claimant timely requested administrative review. On administrative review, the ALJ supplemented and affirmed the Award, and claimant brought this appeal.

### DISCUSSION

¶4 Claimant first argues that the award is legally insufficient for us to review because the ALJ failed to explain how he reached his conclusion that claimant was an independent contractor or that Tatham was not an employer subject to the Arizona Workers' Compensation Act. Although this court will not "speculate" to reconstruct an ALJ's award, *Post v. Indus. Comm'n*, 160 Ariz. 4, 7, 770 P.2d 308, 311 (1989), an ALJ is not required to make specific findings on every issue, as long as he resolves the ultimate issues in the case. See *Cavco Indus. v. Indus. Comm'n*, 129 Ariz. 429, 435, 631 P.2d 1087, 1093 (1981). Further, some findings are implicit in an award. *Pearce Dev. v. Indus. Comm'n*, 147 Ariz. 582, 583, 712 P.2d 429, 430 (1985).

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<sup>1</sup> Prior to the hearing, Tatham filed a motion to dismiss claimant's workers' compensation claim on the basis that he used a stolen or fraudulent social security number on his Worker's Report of Injury. This motion was denied by the ALJ.

¶15 The ultimate issue in this case was whether Tatham was claimant's employer or if claimant was an independent contractor at the time of his injury. In the Award and Decision Upon Review, the ALJ specifically found Tatham's testimony to be more credible than the applicant's testimony and, based on that conclusion, that claimant was an independent contractor. We do not believe that individual findings as to each of the indicia of control were necessary; therefore, the award is legally sufficient.

¶16 Claimant next argues that the ALJ erred by finding that he was an independent contractor rather than Tatham's employee. Whether a worker is an employee or an independent contractor is governed by A.R.S. § 23-902 (Supp. 2010) which provides in pertinent part:

B. When an employer procures work to be done for the employer by a contractor over whose work the employer retains supervision or control, and the work is a part or process in the trade or business of the employer, then the contractors and the contractor's employees, and any sub-contractor and the subcontractor's employees, are, within the meaning of this section, employees of the original employer. For the purposes of this subsection, "part or process in the trade or business of the employer" means a particular work activity that in the context of an ongoing and integral business process is regular, ordinary or routine in the operation of the business or is routinely done through the business' own employees.

C. A person engaged in work for a business, and who while so engaged is independent of that business in the execution of the work and not subject to the rule or control of the business for which the work is done, but is engaged only in the performance of a definite job or piece of work, and is subordinate to that business only in effecting a result in accordance with that business design, is an independent contractor.

¶17 In determining whether a particular claimant falls within the statutory definition of an employee, courts look to the totality of the circumstances of the work and examine various indicia of control. See *Reed v. Indus. Comm'n*, 23 Ariz. App. 591, 593, 534 P.2d 1090, 1092 (1975). The indicia include "the duration of the employment; the method of payment; who furnishes necessary equipment; the right to hire and fire; who bears responsibility for workman's compensation insurance; the extent to which the employer may exercise control over the details of the work, and whether the work was performed in the usual and regular course of the employer's business." *Home Ins. Co. v. Indus. Comm'n*, 123 Ariz. 348, 350, 599 P.2d 801, 803 (1979).

¶18 When determining if a claimant is an employee or independent contractor, it is the ultimate right of control, under the agreement with the claimant, not the overt exercise of that right, which is decisive. 3 Arthur Larson and Lex K.

Larson, *Larson's Workers' Compensation Law*, § 61.02 at 61-3 to -4 (2010). "[A] worker who is regularly employed in the business of an employer is an 'employee' for the purposes of workers' compensation unless the worker is not subject to the employer's control, is hired only to perform a definite job, and is subordinate solely in effecting a desired result." *Cent. Mgmt. Co. v. Indus. Comm'n*, 162 Ariz. 187, 190, 781 P.2d 1374, 1377 (App. 1989).

¶9 Because of the remedial nature of the Arizona Workers' Compensation Act, the definition of an employee is liberally construed. *Hughes v. Indus. Comm'n*, 113 Ariz. 517, 519, 558 P.2d 11, 13 (1976). This court, taking the facts contained in the record, only independently determines whether, as a conclusion of law, claimant is an employee or an independent contractor. *Anton v. Indus. Comm'n*, 141 Ariz. 566, 569, 688 P.2d 192, 195 (App. 1984).

¶10 Here, claimant and Tatham presented substantially conflicting evidence about various indicia of control. Because the ALJ resolved these conflicts in favor of Tatham's testimony, we review the various indicia of control in light of that resolution.

¶11 Tatham testified that he was a licensed attorney and previously had been a commercial litigator, but he was not then practicing law. At the time claimant was injured, Tatham was buying houses, renovating them, and selling them for a profit. Tatham renovated five houses before the economic downturn prevented further renovation projects.

¶12 Tatham met claimant through Alex Lopez after contracting with Lopez to work on the first house he purchased to renovate. Tatham testified that he hired both licensed and unlicensed contractors to perform work on the five investment houses. The work included HVAC, electrician, carpet cleaner and installer, and landscaper.

¶13 Tatham stated that claimant represented himself to be a home-remodeling contractor, so when he needed work done on his second house, he contacted him. Tatham stated that they looked at the work that needed to be done at the house together and reached a negotiated contract price.<sup>2</sup> He paid claimant in cash at the completion of the work.

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<sup>2</sup> Claimant testified that Tatham agreed to pay him \$10 per hour, 8 hours per day. Although Tatham denied this testimony, claimant asserts that it should have been accepted because it was supported by the September 15, 2009 Employer's Report of Injury. When more than one inference may be drawn from the evidence in an ICA proceeding, the ALJ may choose either and his conclusion will not be disturbed unless it is wholly unreasonable. *Reynolds Metal Co. v. Indus. Comm'n*, 22 Ariz. App. 349, 352, 527 P.2d 308, 311 (1974).



¶14 Claimant was injured while working on the 30th Street house; the fourth house he had worked on for Tatham. Tatham testified that there were two to three weeks of work for claimant to perform at the 30th Street house, which included repairing holes, prepping, and painting. He and claimant negotiated a price of \$200.00 to repair the holes in the wood and \$800.00 for the painting. Tatham provided the materials for this work: masking materials, plastic, paint, and leftover plywood from another house. Claimant provided brushes, a paint sprayer, and a compressor, as well as the saw that he was using when he was injured.

¶15 Tatham gave claimant a key to the 30th Street house when claimant was hired on August 21, 2009. He stated that claimant could come and go as he pleased, and he did not set claimant's work schedule, supervise his work, or keep any record of claimant's hours since he was paid by the job. They had no contract of employment, and Tatham did not withhold any taxes. Finally, Tatham testified that he was out of town at the time claimant was injured. Based on the ALJ's resolution of the evidentiary conflicts and his credibility determination, we believe that there is reasonable evidence to support his finding that claimant was an independent contractor at the time of his injury.

**CONCLUSION**

¶16           For all the foregoing reasons, we affirm the award.

/s/

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MAURICE PORTLEY, Judge

CONCURRING:

/s/

\_\_\_\_\_  
PETER B. SWANN, Presiding Judge

/s/

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PATRICK IRVINE, Judge